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ABSTRACT

The torts of negligent hiring and negligent retention occur when an employer breaches a duty in hiring or retaining an employee who is incompetent or unfit for the job to which the employee is assigned; and consequently, the actions of that employee proximately cause injuries to a third party. This paper examines legal issues regarding negligent hiring and retention and employer liability in the nonpublic schools. Following definitions of terms, the paper covers the following topics: elements of the prima facie case, respondeat superior distinguished, liability for acts outside the work day, the crux of the cause of action, the extensiveness of a background check, and limitations on liability. Theory is also applied to "Scott v. Blanchet High School." Recommendations for avoiding liability for negligent hiring or retention include: (1) any hiring protocols should include careful background checks; and (2) school administrators should develop a uniform screening/hiring procedure. Although these procedures are time-consuming, being involved in extensive judicial proceedings is even more so. (LMI)

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Philadelphia, Pennsylvania

LITIGATION AND LIABILITIES: ISSUES IN NONPUBLIC SCHOOLS

(Negligent Hiring and Retention and Employer Liability)

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OUTLINE

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NEGLIGENT HIRING AND RETENTION AND EMPLOYER LIABILITY

ROBERT A. PERROTTA

Definition

The torts of negligent hiring and negligent retention occur when an employer breaches a duty in hiring or retaining an employee who is incompetent or unfit for the job to which the employee is assigned; and consequently, the actions of that employee proximately cause injuries to a third party. DiCosala v. Kay, 450 A.2d 508 (N.J. 1982); Henley v. Prince George's County, 503 A.2d 1333 (Md. 1986); Schmitt, M.J. "Employer Owes a Duty to General Public to Use Reasonable Care in Hiring and Retaining Employees," 9 Balt. L. R. 435 (1980). The focus of the tort of negligent hiring is on the employee selection process. On the other hand, the tort of negligent retention targets the course of employment whereby an employer becomes aware or should have become aware of an employee's problems which indicate that he or she is unfit or dangerous. Foster v. Loft, 526 N.E. 2d 1309 (Mass. App. 1988); School Board of Orange County v. Coffey, 524 So.2d 1052 (Fla. 1988). The majority of states have considered these theories of negligent conduct and have granted damages against employers who are judged to have hired or retained employees negligently. DiCosala v. Kay, 450 A.2d 508 (N.J. 1982); 53 Am Jur 2d, Master and Servant, sec. 422 (1970); DeMitchell, T. A.

"Negligent Hiring of School District Employees," Paper presented at NOLPE Convention, Nov. 19, 1993; Peterson, D. J. & Massengill, D. "The Negligent Hiring Doctrine - A Growing Dilemma for Employers," 15 Employee Relations L. J. 419 (1989-90). Since these two torts are so similar they will be considered together for the purpose of this analysis.

Prima Facie Case

A plaintiff bringing an action for negligent hiring or retention must prove each element of the prima facie case. These elements are:

1. The existence of an employment relationship;
2. The employee's incompetence;
3. The employer's actual or constructive knowledge of such incompetence;
4. The employee's act or omission causing the plaintiff's injuries; and
5. The employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries.

Peterson, D. J. & Massengill, D. (1989-90) at 420).

Respondeat Superior Distinguished

The torts of negligent hiring and negligent retention are separate from the legal theory of respondeat superior thus providing third parties an alternate basis to seek redress for their injuries against an employer. Under respondeat

superior, an employer is only liable for the behavior of employees when the employees are acting within the scope of their employment. The Supreme Court of New Jersey in DiCosala v. Kay, 450 A2d 508 explained that the doctrine of respondeat superior is a formula designed to determine which unauthorized acts of an employee can be charged to an employer. The standard delineates "those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonable incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment" (at 513).

Negligent hiring and negligent retention support an action against an employer when an employee's actions are not within the course and scope of employment. Watson v. City of Hialeah, 552 So.2d 1146 (Fla. App. 1989). Under these legal theories, the employer becomes "principally liable for negligently placing an unfit person in an employment situation involving an unreasonable risk of harm to others." Victory Tabernacle Baptist Church, 372 S.E.2d 391, 394 (1988). These torts even allow for remedies against an employer for intentional torts and criminal acts committed by employees, actions commonly barred under the doctrine of respondeat superior. The Appellate Court of Illinois has stated that "a cause of action for negligent or reckless hiring of an employee is recognized even though the employee commits the

criminal or intentional act outside the scope of employment." Gregor by Gregor v. Kleiser, 443 N.E.2d 1162, 1166 (Ill. App. 1982); See Also DiCosala v. Kay, 450 A.2d 508,515 (N.J. 1982).

Liability for Acts Outside the Work Day

Generally, liability for negligent hiring and retention only attains for actions of an employee that occur during the work day or while an employee is acting under the color of his or her employment. Harvey Freeman & Sons Inc. v. Stanley, et al, 378 S.E.2d 857 (GA, 1989). However courts may find liability when an employee acts outside of the bounds of the work day as long as the employee comes in contact with the plaintiff as a result of the employment relationship. For example, in Scott v. Blanchet High School, 747 P.2d 1124 (Wash. 1987), parents brought an action against Blanchet High School and the Archdiocese of Seattle for harm occurring to their daughter from a relationship which included sexual and romantic activities between their daughter and a teacher. The court said that "the liability of a school is not limited to situations involving school hours, property or curricular activities" (at 1128-9).

The Crux of the Cause of Action

The crucial element in negligent hiring and negligent retention cases is whether the employer knew or should have known of the employee's unfitness or dangerous propensities.

An employer owes a duty to the public to use reasonable care in selecting employees who are competent to perform the tasks assigned. Employees must not be unfit or have dangerous propensities so as to create a foreseeable risk of injury to those clients with whom they come in contact. Consequently, if an employer specifically knew of an employee's unfitness, incompetence, or dangerous propensities while employed, and it was reasonably foreseeable that the employee would create a risk of danger to the public due to these qualities, then an employer will be held liable in negligence. DiCosala v. Kay, 450 A.2d 508 (N.J. 1982); Rosenstiel v. Pittsburgh Railways Co., 79 A. 556 (1911).

However, even in the absence of actual knowledge, an employer can be held liable if a reasonable inquiry would have produced evidence of an employee's dangerousness, unfitness, or incompetence. Coath v. Jones, 419 A.2d 1249 (Pa. Super. 1980); Dempsey v. Walso Bureau, Inc., 246 A.2d 418 (Pa. 1968). In Medlin v. Bass, 398 S.E.2d 460 (N.C. 1990), parents sued the Franklin County Board of Education for sexual assaults against their daughter committed by the elementary school principal. They claimed that the defendants were negligent in hiring and retaining a principal who previously resigned from another school after he was accused of sexually assaulting a student. The facts of the case showed that the school system did, in fact, carefully check the principal's recommendations

and investigated what remained an unconfirmed rumor relating to the principal's sexual tendencies. Furthermore, the principal satisfactorily performed his duties for 16 years at the school. Thus, the court held the school system neither knew or "could have known of defendant's ... tendencies prior to the incident that is the subject of this lawsuit. [Plaintiff] ... thus failed to establish an essential element of a claim for negligent hiring or retention" (at 463).

In Scott v. Blanchet High School, 747 P.2d 1124 (Wash. 1987), parents based their claim, in part, on the school's duty to take precautions to protect students from reasonably anticipated dangers. However, the court found that no evidence was put forth to show that Blanchet High School knew of the offending teacher's sexual propensities or had reason to know of these propensities (at 1128). These cases illustrate that a careful background check coupled with proper supervision are essential practices if an employer is to avoid liability under negligent hiring and negligent retention claims.

The Extensiveness of a Background Check

Due to the nature of educating children in a school setting, an extensive background check might be called for in order for an employer to avoid potential liability. Courts have held that when employees are hired for sensitive positions, "a mere lack of negative evidence may not be

sufficient to discharge the obligation of reasonable care ... Realizing that job applicants generally provide references who are certain to produce favorable reports, we think that background checks in these circumstances should seek relevant information that might not otherwise be uncovered." Welsh Manufacturing Division of Textron v. Pinkerton's, 474 A.2d 436, 441 (R.I. 1984). It is clearly arguable that faculty and staff who constantly interact with children are placed in a special position of trust so as to warrant a careful investigation to assure a potential employee's honesty, trustworthiness, and reliability. Thus, schools will probably be held to a higher standard of care than might be required in other areas of employment.

Limitations on Liability

While a review of the literature gives rise to an inference that the scope of employer liability for negligent hiring and retention is extensive, courts have made it clear that there are many kinds of unfitness that do not give rise to tort liability. In Fallon v. Indian Trail School, 500 N.E.2d 101 (Ill. App. 1989), the court stated that liability for negligent hiring arises when "a particular unfitness of an applicant creates a danger of harm to a third person which the employer knew, or should have known, when he hired and placed this applicant in employment where he could injure others" (at 104). Consequently, it rejected plaintiff's allegations that

the district was guilty of negligent hiring and retention for failing to investigate the credentials and teaching abilities of two of the school's physical education teachers. Plaintiff's allegations were legally insufficient to support a cause of action for no particular unfitness was alleged which, if known by the school, would have created a danger to the children. The Fallon court also held that "employers may hire the mentally and physically handicapped who have some degree of unfitness" (at 103). Employers do not assume liability merely because of an employee's unfitness absence a nexus between the injury and the alleged unfitness.

An employer will not be held liable because it does not require employees to submit to pre-hiring or periodic post-hiring psychological testing. In Southern Bell Telephone & Telegraph Company v. Sharara, 307 S.E.2d 129 (Ga.App. 1983), appellee admitted that the employer had no knowledge of employee's dangerous propensities. However, appellee alleged that the employer would have known of the employee's violent propensities if employees were required to submit to periodic psychological testing. The court noted that absent special circumstances, it found "no statute or court decision which would authorize the establishment of a blanket requirement that an employer submit all of its employees to a series of periodic psychological tests or interviews to determine whether any employee has developed or is developing negative

or antisocial propensities" (at 131). The Southern Bell court also noted that an employer would not be held liable for negligent hiring or retention simply because it knew or should have known that an employee was having marital problems. The crux of the action is proof of proximate causation between the problems of the employee and the injury to a third party.

Avoiding Liability for Negligent Hiring or Negligent Retention

The essence of the tort of negligent hiring or negligent retention stems from whether the employer knew or should have known of the employee's unfitness or dangerous propensities. Consequently, the primary means of avoiding liability is to institute careful screening procedures for all employees. Based on the reasoning of the Welsh court, schools may be held to a higher standard of care in selecting employees due to the sensitive nature of the work of schooling. Thus, any hiring protocols should include careful background checks which affirmatively screen for propensities that would be particularly dangerous in a school setting.

School administrators should develop a uniform procedure for screening and hiring all job applicants. These procedures should include an application form which requests a listing of previous employers over the last 10 years. It should also contain a statement, certified by the applicant, that all information contained therein is true and accurate, and any falsification of information is grounds for disqualification

from consideration or dismissal from employment. All applicants should be screened by a committee utilizing a uniform criteria to determine those applicants who are to be invited for an interview. No applicant should be granted an interview unless he or she meets all of the qualifications for the position.

Before applicants are scheduled for an interview, they should be asked to submit educational transcripts and letters of reference. They should also be informed that the Committee will contact present and past employers. It is the role of the Committee to carry out a thorough background check aimed at uncovering all relevant information on the suitability of the applicant for the position to which he or she is applying. The Committee should contact not only sources listed by the applicants but also alternate sources. The suitability of an applicant should be judged on affirmative statements concerning his or her ability and character rather than the fact that an applicant's file contains no negative statements.

The Committee should include in a file copies of all written requests for information from an applicant's previous employers, all responses, and detailed notes on any oral communications that may have taken place in carrying out the background check. Notes should identify the name and position of the person contacted, the address and telephone number, and the date and time of the communication. Such a written record

will serve as powerful evidence which can be offered to disprove allegations of negligent hiring.

Applicants who pass this extensive background check should be interviewed by the Committee using a common list of questions aimed at assessing an applicant's ability and suitability for the position. Before any applicant is offered a position, he or she should be asked to sign an authorization allowing the employer to conduct a criminal investigation on the applicant. An employer must be careful on how the results of a criminal investigation are used so as not to violate an applicant's civil rights under Title VII and related state statutes.

While the process of screening applicants for a position can be very time consuming, it is of critical importance to follow all of the steps outlined above if an employer is to protect itself against claims of negligent hiring and retention. The time spent in following a careful screening process will wax pale in comparison to the time and expense in being embroiled in the judicial web.